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STOP THE PRESSES! THE *QUATTLEBAUM* DOCTRINE: IMPOSING PRIOR RESTRAINTS TO KEEP ATTORNEY-CLIENT PRIVILEGED COMMUNICATIONS OUT OF THE HEADLINES

*"No right ranks higher than the right of the accused to a fair trial."**

I. INTRODUCTION

You are sitting in jail awaiting trial for murder. Fellow inmates crowd the common area as you all try to watch the news. Suddenly, your own face appears on the television screen talking to your lawyer. You and the other prisoners listen to you pour your heart out, divulging to the attorney every minute detail of your actions the night of the murder. The guards whisper and snicker.

Yes, your lawyer had promised that your conversations with him would be a secret. Yes, he had assured you that the jail's interrogation room was safe from prying eyes and cupped ears. But the jailer broke the law. With a hidden camera and microphone, a deputy sheriff secretly videotaped your conversations, and that videotape fell into the hands of the largest television station in the state, which will soon relay it to nearly every potential juror in your area. Oh, and in case anybody misses the several television airings, your entire interview with your attorney will also be printed in tomorrow morning's newspaper.

Your lawyer did what he could to stop the broadcast; he asked the judge to prevent the television station from broadcasting the tape. However, the judge refused, explaining that the right of the press to publish anything it wanted was more important than your right to talk privately to your lawyer while facing a trial for your life.

This drama could unfold in any state in the Union except South Carolina. In *State-Record Co. v. State* (*Quattlebaum*)[1] the South Carolina Supreme Court marked the boundary beyond which freedom of the press cannot impede the constitutional right to a fair trial. The South Carolina

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*Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501, 508 (1984).

1. 332 S.C. 346, 504 S.E.2d 592 (1998), *cert. denied*, 119 S. Ct. 1355 (1999).

Supreme Court upheld a "prior restraint"[2] against the media's publishing of a government agent's surreptitious recording of a privileged conversation between a criminal defendant and the defendant's attorney.[3]

Quattlebaum is a salvo on the front lines of the battle between the First Amendment rights to free press and free speech[4] and a criminal defendant's Sixth Amendment right to a fair trial.[5] Under the Fourteenth Amendment, the states must abide by both the First and Sixth Amendments in all state actions.[6] The United States Supreme Court created the modern demarcation line between the two rights in 1976. In *Nebraska Press Ass'n v. Stuart*[7] the Supreme Court affirmed that "'[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity.'"[8] Since that decision, the Supreme Court has allowed only one prior restraint against publication to remain intact for the purpose of protecting a criminal defendant's right to a fair trial.[9] That sole exception, like *Quattlebaum*, involved a purloined tape-recorded conversation between a criminal defendant and his attorney. The

2. A "prior restraint" is distinguishable from a "gag order," although the two terms are sometimes used interchangeably. A "gag order" prohibits persons privy to confidential information (such as parties in a case, attorneys, police officers, and court officials) from revealing information to outsiders, especially the media. However, it does not prohibit publication by the press of information the press obtains. A "prior restraint" is far more restrictive, prohibiting the press from publishing information which it possesses or may obtain. *See id.* at 350 n.7, 504 S.E.2d at 594 n.7.

3. *See id.* at 350, 504 S.E.2d at 594.

4. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. This prohibition extends to the executive branch and, more recently (since 1968), to the judiciary, as well as to Congress. *See Quattlebaum*, 332 S.C. at 360 n.2, 504 S.E.2d at 599 n.2 (Toal, J., concurring and dissenting). While the application of the First Amendment to judicial prior restraints is settled, *see* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968), the modern extension of the original constitutional mandate helps distinguish circumstances where prior restraints may be constitutional. *See Quattlebaum*, 332 S.C. at 359, 504 S.E.2d at 599 ("At the outset, it is essential to understand that all prior restraints are not equal.").

5. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

6. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976) ("Because 'trial by jury in criminal cases is fundamental to the American scheme of justice,' the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions.") (quoting Duncan v. Louisiana, 391 U.S. 145, 149 (1968)); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 707 (1931) ("It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.").

7. 427 U.S. 539 (1976).

8. *Id.* at 558 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

9. *See* United States v. Noriega (Noriega II), 917 F.2d 1543 (11th Cir. 1990) (per curiam).

defendant was former Panamanian dictator General Manuel Noriega.[10] Unfortunately, factual and procedural peculiarities in the *Noriega* case renders it an uncertain precedent.[11]

In Part II, this Note outlines the facts of *Quattlebaum*. Parts III and IV then review the purposes and treatment over the past two hundred years of the First Amendment right to a free press and the Sixth Amendment right to a fair trial, respectively, as well as related constitutional-law and common-law keystones. Part V juxtaposes the traditional conflict between the First and Sixth Amendments regarding impartial juries with the additional issues encountered when the debated publication consists of privileged communications.

The examination which follows reveals that while the freedom of the press is always fervently guarded, it has never been held to be an absolute right over all other individual rights and societal interests. On the other hand, a criminal defendant's right to a fair trial has always been absolute and never subordinate to any other right or societal interest, even if the Supreme Court occasionally bends the meaning of "fair" to accommodate the exigencies of a particular case. *Nebraska Press* provides a necessary leash against trial courts using a heavy hand to restrain generalized media activity in high-profile criminal cases. But *Nebraska Press* is ill-suited to guide a trial court faced with the potential publication of specific information devastating to the judicial process, such as the disclosure of attorney-client confidences. The South Carolina Supreme Court in *Quattlebaum*, just like the court in *Noriega II*, correctly distinguished such limited circumstances from the sweeping restraints that *Nebraska Press* was designed to resolve, as outlined in the analysis of the *Quattlebaum* decision in Part VI.

In Part VII, this Note suggests a system more precise than that afforded by *Nebraska Press* and more true to the protection of individual rights. This system is one that future courts could employ when faced with the unique conflict between the First Amendment right to a free press and a criminal

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10. *See id.*; *see also* MATTHEW D. BUNKER, JUSTICE AND THE MEDIA: RECONCILING FAIR TRIALS AND A FREE PRESS 75 (1997) ("Apparently, the only reported case since *Nebraska Press* in which federal courts have upheld a restraint on criminal justice-related material already in the hands of the press is *U.S. v. Noriega*."). *But cf.* KUTV, Inc. v. Wilkinson, 686 P.2d 456, 458, 462 (Utah 1984) (upholding a trial court's restraint against media publication of allegations that a criminal defendant was connected to the Mafia). The Tennessee Court of Criminal Appeals has recently considered the same issues in *State v. Huskey*, No. 03C01-9811-CR-00410, 1999 WL 39507 (Tenn. Crim. App. Jan. 29, 1999). In *Huskey* a trial court restrained a local newspaper from publishing information garnered from purloined records of the court-appointed defense counsel's time sheets showing activities, experts, and costs, all of which reflected evidence being gathered, persons being interviewed, and other information indicative of trial strategy and tactics. *See id.* at *1-*2. The court held that without copies of the defense attorney's records at issue it could not perform the analysis required by *Nebraska Press*, nor could it determine the scope of any injunction which might be justified. Because neither party had submitted the records for the court's review, despite several opportunities, the grant of extraordinary appellate review was dismissed as improvident. *See id.* at *7-*8.

11. *See Quattlebaum*, 332 S.C. at 357-58, 504 S.E.2d at 598.

defendant's interests under the Fifth and Sixth Amendments in protected attorney-client confidences.

II. THE ROOTS OF THE *QUATTLEBAUM* SAGA

In May 1995, Lexington County police arrested twenty-five-year-old B.J. Quattlebaum for murder, first degree burglary, armed robbery, and related offenses all stemming from a single incident.[12] While detained in the Lexington County Detention Center, he met privately with local defense counsel Jack Duncan.[13] No party disputes that this meeting was protected by the attorney-client privilege.[14] Subsequently, the Lexington County solicitor indicted Quattlebaum and sought the death penalty.[15] Quattlebaum's case was docketed for November 1997,[16] and Joseph McCulloch assumed duty as Quattlebaum's lead counsel. As trial approached, McCulloch repeatedly demanded discovery from the prosecution.[17] Finally, in August 1997, the prosecution provided partial discovery which included a videotape, previously unknown to the defense, of the jailhouse attorney-client conference a year earlier between Quattlebaum and Duncan.[18] A member of the Lexington Country Sheriff's Department made the videotape through surreptitious electronic eavesdropping without either Quattlebaum's or Duncan's knowledge.[19]

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12. *Id.* at 347-48, 504 S.E.2d at 593; Clif LeBlanc, *Deputy's Videotaping Trial Postponed*, THE STATE (Columbia, S.C.), Sept. 25, 1998, at B3.

13. John Allard, *S.C. Supreme Court Upholds Gag Order*, THE STATE (Columbia, S.C.), Sept. 1, 1998, at B1. This was Quattlebaum's first meeting with Duncan after being arrested. *See Quattlebaum*, 332 S.C. at 361, 504 S.E.2d at 600 (Toal, J., concurring and dissenting).

14. *Quattlebaum*, 332 S.C. at 348 n.1, 504 S.E.2d at 593 n.1.

15. *Id.* at 348, 504 S.E.2d at 593.

16. *See* Record on Appeal at 13.

17. *See id.* at 41.

18. *See id.*

19. *See id.* at 41-42, 43. The FBI investigated the videotaping incident at the request of the trial judge. *See* Allard, *supra* note 13, at B1. Three detectives (deputy sheriffs) and a deputy solicitor were implicated in the rogue videotaping of Quattlebaum and Duncan. *See* LeBlanc, *supra* note 12, at B3. Federal prosecutors indicted one deputy sheriff, David Grice, for wiretapping and related charges in the Quattlebaum matter and in an incident involving another defendant and counsel. *See* United States v. Grice, No. Crim. 3:98-759-19, 1998 WL 999907 (D.S.C. Nov. 12, 1998). Counsel for Quattlebaum moved to exclude the audio contents of the tape from Grice's trial or, in the alternative, to close that portion of the trial to the press if the audio contents were presented. *Id.* at *1. The district court held that the videotape, the federal prosecutor's key evidence against the deputy sheriff, could not be admitted in the deputy's trial. District Court Judge Shedd did not need to rely on Quattlebaum's constitutional rights; rather, he found that the exclusionary rule of 18 U.S.C. § 2515 prohibited the Government from using any illegally obtained wiretap in any trial, including a trial of a defendant wiretapper, without the permission of the victim of the wiretap. *See id.* at *1-*2 & *1 n.4. Congress enacted the statute to protect the privacy of the victim of the illegal wiretapping. The particular wiretapping involved in *Grice* invaded "one of the most private communications recognized in this country: a privileged attorney-client conversation," and its use by the Government, "even in a closed courtroom setting, may [have] prejudice[d] Quattlebaum's right to a fair retrial." *Id.* at *2. Judge

By August 18, McCulloch learned that at least one media outlet, WIS Television, held a copy of the videotape,[20] although WIS authorities promised to air only the video portion without the audio.[21] Nevertheless, McCulloch moved for an immediate ex parte temporary restraining order, in pursuit of a permanent injunction, to enjoin the prosecutor, defense, law enforcement officials, "and any media or news agency, in particular WIS-TV, from the airing, reporting, specifically characterizing or disseminating . . . the *audio* contents" of the tapes.[22] The Deputy Solicitor for the Eleventh Circuit, which includes Lexington County, consented to the motion.[23] McCulloch provided the court with a copy of the videotape for *in camera* review, where it remained under seal.[24]

That afternoon, the circuit judge presiding over the case, Judge Thomas W. Cooper, Jr., issued a temporary restraining order, pending further hearing, prohibiting "all participants, including prosecution, law enforcement, the defense, *and all media* . . . from disseminating the substance and details of the privileged communication between [Quattlebaum] and his counsel."[25] Judge Cooper later reported that prior to signing the order he spoke with WIS-TV's news director, explained the proposed order to him, and received confirmation that WIS would not publish the restrained matters.[26] Judge Cooper also

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Shedd ordered the case against Grice held in abeyance until the United States could appeal. *Id.* at *3. Observers expect a year delay. *See, e.g.*, Clif LeBlanc, *Videotaping Trial Postponed Up To 1 Year*, THE STATE (Columbia, S.C.), Nov. 10, 1998, at B3. Deputy Grice was not charged with a third incident of secretly recording another defendant and his attorney because federal prosecutors deemed that incident "an honest mistake." LeBlanc, *supra* note 12, at B3.

20. *See* Record on Appeal at 42.

21. *See id. The State*, a South Carolina newspaper, subsequently reported that it too "did not plan at the time to publish the contents [of the conversation]." *See* Allard, *supra* note 13, at B1.

22. Record on Appeal at 39 (emphasis added). The motion requested prohibition of only the audio soundtrack, not the video. *See id.* at 39-40. The motion and subsequent order did not prevent the media from reporting the existence of the tapes, nor the pictures from them; it prevented only the broadcast of the actual conversation recorded between Quattlebaum and his defense counsel. *See id.* at 4-5, 39-40. Before learning that the videotape had been leaked to the media, McCulloch had filed a motion in limine asking the court to "limit[] the in-court and extra-judicial comments by the prosecution, law enforcement and defense" and to prevent the parties from divulging the contents or characterization of the videotape. *Id.* at 43.

23. *See id.* at 40.

24. *See id.* at 18.

25. *Id.* at 5 (emphasis added). Judge Cooper addressed the order to the Solicitor's Office, the Sheriff's Department, and WIS-TV. *See id.* at 4. The South Carolina Supreme Court held that *The State* "was 'in active concert' with WIS and had actual notice of the order so as to be bound by it." State-Record Co. v. State (Quattlebaum), 332 S.C. 346, 350, 504 S.E.2d 592, 594 (1998), *cert. denied*, 119 S. Ct. 1355 (1999). Because the order prohibited WIS from "disseminating" the contents, and not merely from "broadcasting" the audio portion of the tape, WIS and *The State* were also prohibited from transferring it to news media outside of the court's jurisdiction. However, the temporary restraining order did not prohibit reporting of the videotape's existence, its significance as a breach of an attorney-client conversation, the identity of the participants, or broadcast of the video without sound. *See id.* at 348, 504 S.E.2d at 593.

26. *See* Record on Appeal at 8.

unsuccessfully attempted to contact Jay Bender, counsel for the South Carolina Press Association and for State-Record Company, publisher of the major daily newspaper in the region.[27]

The following day, Bender filed a motion on behalf of State-Record Company to dissolve the order. He claimed that the court lacked jurisdiction over the company and that "the order constituted an impermissible prior restraint under the First and Fourteenth Amendments to the United States Constitution."[28] Judge Cooper conducted a hearing that afternoon, with Bender arguing on behalf of State-Record Company to dissolve the restraining order and McCulloch arguing on behalf of Quattlebaum to maintain the order.[29] McCulloch decried the prosecution's invasion of the attorney-client privilege.[30] Judge Cooper denied State-Record Company's motion to dissolve the temporary restraining order and instead specified that the order would remain in effect until a jury was empaneled and sequestered.[31]

At trial, the court convicted Quattlebaum of murder and other charges and adjudged the death penalty.[32] Quattlebaum appealed the conviction, in part asserting an unfair trial because law enforcement officials recorded his conversation with his attorney.[33]

III. AN UNSTOPPABLE FORCE: THE FIRST AMENDMENT

The first ten amendments to the United States Constitution became collectively known as the Bill of Rights. The First Amendment responded to the people's insistence on freedom to criticize the government, government officials, and the political process. The citizens of the United States were eager to avoid oppressive restrictions, woven throughout Europe's history, which prevented criticism of the government, especially those requiring all proposed

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27. *See id.* at 8-9. *The State*, published by State-Record Company, is Columbia's only major daily newspaper.

28. Record on Appeal at 38. In later argument and on appeal, State-Record asserted that the criminal trial court had neither subject matter nor in personam jurisdiction to enforce an injunction against the newspaper. The court overruled these objections. *See Quattlebaum*, 332 S.C. at 349, 504 S.E.2d at 593-94. These issues are beyond the scope of this Note and are not discussed further.

29. *See* Record on Appeal at 6-34. There is no record of any participation by WIS-TV in these or subsequent proceedings. The Solicitor's Office had consented to the motion for the restraining order and the order itself. *See id.* at 5, 40. However, the Solicitor's Office subsequently refused to appear at the hearing, asserting that "'they did not have a dog in that fight.'" *Id.* at 35.

30. *See id.* at 18. As noted earlier, the FBI's investigation implicated a deputy solicitor in the videotaping incident. *See supra* note 19.

31. *See* Record on Appeal at 33.

32. *Quattlebaum*, 332 S.C. at 348 n.4, 504 S.E.2d at 593 n.4.

33. *See* Allard, *supra* note 13, at B1.

publications to be approved by the government prior to distribution.[34] The guarantee of a free press was not a superfluous addition to the guarantee of free speech.[35] The right to a free press was included in the First Amendment primarily "to create a fourth institution outside the Government as an additional check on the three official branches."[36]

Significant cases by the Supreme Court enforcing the protections offered by the First Amendment did not emerge until the early twentieth century.[37] Until then, the few decisions rendered by federal and state courts were generally "antagonistic to free speech claims."[38] Starting during World War I, federal and state legislators passed anti-espionage acts to quash war protestors who encouraged insubordination in the military and impeded recruiting for the war effort.[39] Challenges to these statutes created the "clear and present danger" test espoused by Justice Holmes in *Schenck v. United States*.[40] The same year, Justice Holmes dissented when the Supreme Court upheld convictions for distributing pamphlets calling for strikes by munitions workers.[41] Further defining the requirement that the danger must be "present" as well as "clear," Justice Holmes justified restraint on publication only where the danger was so pervasive and imminent that there was not sufficient time for it to be abated by countervailing publications and discourse.[42]

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34. In England, after the printing press was invented, publishers had to submit all manuscripts for prior approval by "crown officials empowered to censor objectionable passages and to approve or deny a license for the printing of the work." LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 8 (1960). Censorship originally applied only to "false speech," but later expanded to cover a broad and vague range of "dangerous utterances." *Id.* at 7-8. Prohibited speech included "heresy and other religious crimes," "opinions deemed pernicious," and "seditious libel." *Id.* at 8, 10. Although the prior restraints imposed by the government disappeared in 1694, common-law criminal sanctions continued against any publication deemed scandalous, derogatory, or contemptuous towards the government or that would cause the government ridicule or scorn. *See id.* at 13.

35. "If the Free Press guarantee meant no more than freedom of expression, it would be a constitutional redundancy." Potter Stewart, *"Or of the Press"*, 26 HASTINGS L.J. 631, 633 (1974-1975).

36. *Id.* at 634.

37. "No important case involving free speech was decided by [the Supreme] Court prior to *Schenck v. United States*, 249 U.S. 47 (1919)." Dennis v. United States, 341 U.S. 494, 503 (1951).

38. MARC A. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 29 n.* (2d ed. 1982).

39. *See id.* at 29.

40. 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.").

41. *See* Abrams v. United States, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

42. *See id.* at 630-31 ("Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech.'") (alteration in original).

The freedom of the press grew in 1931 in *Near v. Minnesota ex rel. Olson*.[43] In that case, the Court struck down a Minnesota statute allowing injunctions against any business which regularly or customarily produced malicious, scandalous, and defamatory newspapers, magazines, or other periodicals.[44] Writing for the Court, Chief Justice Hughes held that the constitutional guarantee of liberty of the press "'was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers.'"[45] While providing the foundation for the modern holdings of freedom of the press, *Near* affirmed that "[l]iberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."[46]

An absolutist approach to freedom of expression has always found adherents, but has never been accepted by a majority of the Supreme Court.[47] Instead, a balancing of the interests between the benefits of a free press and other societal interests has evolved into a "two tiered approach," which distinguishes between *categories* of speech.[48] Political speech regarding and, in particular, criticizing the government mandates the highest protection of freedom of expression,[49] whereas non-political speech more readily yields to other societal interests.[50]

The Supreme Court upheld the primacy of political speech criticizing the government and distinguished it from less protected speech in *New York*

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43. 283 U.S. 697 (1931).

44. *See id.* at 722-23. The statute was used to shut down a virulently anti-Semitic newspaper which routinely made scurrilous attacks on the competence and motives of local public officials. *See id.* at 704; *see also* Nebraska Press Ass'n v. Stuart 427 U.S. 539, 556 (1976) (discussing *Near*).

45. *Near*, 283 U.S. at 717 (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825)).

46. *Id.* at 708.

47. *See* FRANKLIN, *supra* note 38, at 28-29, 35.

48. *Id.* at 35.

49. *See supra* text accompanying note 45.

50. Some types of speech are anathema to the interests of society and are never protected. Justice Murphy expressed this view:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury .... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (footnote omitted).

Times Co. v. United States.[51] The Court refused the United States Attorney General's request to block publication of previously secret official reports reflecting poorly on the government's conduct of the Vietnam War.[52] To distinguish the impermissible restraint sought by the government, members of the Court expressly pointed out incidences where the government could constitutionally restrain the press from publishing. For instance, Justice Brennan agreed that unprotected speech is subject to prior restraint, not just after-the-fact sanctions. He noted that obscenity could be subject to prior restraints on publication.[53] Justice White observed that the National Labor Relations Board and the Federal Trade Commission are empowered to issue cease-and-desist orders against publishing material deemed to be unfair to workers or consumers, respectively.[54] Justice White noted the distinction between a private citizen's right to use government power to enjoin the press in order to protect a private right and the government's attempt on its own behalf to prevent publication about government operations.[55] Thus, the government lawfully wields the power of prior restraint in numerous circumstances, whether on behalf of the public at large or to protect the rights and interests of individual citizens.

In a public address four years later, Justice Stewart explained the constitutionally unique nature of "freedom of the press":

> Most . . . provisions in the Bill of Rights protect specific liberties or specific rights of individuals: freedom of speech, freedom of worship, the right to counsel, the privilege against compulsory self-incrimination, to name a few. In contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection.[56]

Accordingly, the Constitution specifically protects the "publishing business" in order to protect the people from the government. However, nothing in the Constitution grants the "publishing business" the right to run roughshod over the "specific rights of individuals." This belief lays the foundation for the

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51. 403 U.S. 713 (1971) (per curiam).

52. The Supreme Court refused to uphold the United States Attorney General's request for a temporary restraint on publication of a Pentagon study entitled "History of U.S. Decision-Making Process on Viet Nam Policy." *Id.* at 714.

53. *Id.* at 726 n.* (Brennan, J., concurring).

54. *Id.* at 731 n.1 (White, J., concurring).

55. *Id.* (White, J., concurring) (referring to the right of private citizens to seek to enjoin the press from publishing copyrighted material).

56. Stewart, *supra* note 35, at 633.

conflict between the rights to a free press and to a fair trial.

IV. AN UNSTOPPABLE FORCE MEETS AN IMMOVABLE OBJECT: THE RIGHT TO A FAIR TRIAL

The Supreme Court has found the basis of the First Amendment in the hypothesis that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies."[57] However, sole criminal defendants are rarely able to engage in such "free debate," having little power or influence to have their voices heard. They are often constrained by admonitions, so they say nothing lest they jeopardize their Sixth Amendment guarantee to a fair trial.

In an early commentary on the conflict between the rights to a fair trial and to a free press, Lord Ellenborough justified restricting the press from publishing pretrial hearings:

> If anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced. . . . [P]reliminary examinations['] only tendency is to prejudge those whom the law still presumes to be innocent, and to poison the sources of justice.[58]

The first Congress proposed, and the states ratified, the Sixth Amendment as one of the first ten amendments to the Constitution. "The common-law rule that looked upon jurors as interested parties who could give evidence against a defendant was explicitly rejected by the Sixth Amendment provision that a defendant is entitled to be tried by an 'impartial jury.'"[59]

Trial by jury in criminal cases is fundamental to the American scheme of justice.[60] The essence of the American trial system is that "the conclusions

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57. Dennis v. United States, 341 U.S. 494, 503 (1951).

58. Rex v. Fisher, 170 Eng. Rep. 1253, 1255 (1811), *quoted in* Gannett Co. v. DePasquale, 443 U.S. 368, 389-90 n.20 (1979).

59. *Gannett*, 443 U.S. at 385 (footnote omitted).

60. Notably, only the Sixth Amendment and, to a lesser degree, the Seventh Amendment guarantee of a jury trial in civil cases, are directive; they mandate that the government guarantee a process. Each of the other eight original amendments are restrictive; they prohibit the government from taking certain actions. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), Justice White wrote for the court that a jury trial "is not necessarily fundamental to fairness in *every* criminal system that might be imagined.... A criminal process which was fair and equitable but used no juries is easy to imagine." *Id.* at 150 n.14 (emphasis added). But, a fair

to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[61] The judicial dilemma posed by prior restraints ordered to protect the right to a fair trial is a modern phenomenon, dating only from 1976.[62] The jurisprudence regarding prior restraints evolved from the national security, political, and personal sensibilities arenas.[63] In these cases, the clash of constitutional rights was not between two private parties; instead, a private party's First Amendment claim conflicted with public (or at least government) interests. With almost no instances of prior restraints involving criminal trials, the conflict between the First Amendment and a defendant's right to a fair trial is examined primarily in appeals of trials tainted by prejudicial publicity.

In *Irvin v. Dowd*[64] the Supreme Court reversed a murder conviction that followed intensive, hostile, and pervasive news coverage.[65] Of 430 persons called for jury duty, 370 expressed opinions ranging from "mere suspicion to absolute certainty" that the defendant was guilty.[66] Eight of the twelve selected jurors admitted a predetermination of guilt, but were seated (over Irvin's objection) after asserting that they could nevertheless render an impartial verdict.[67] The Supreme Court reversed, holding that "such a statement of impartiality can be given little weight" where, surrounded by a "huge . . . wave of public passion," two-thirds of a jury admitted believing the defendant was guilty before hearing any evidence.[68] Justice Frankfurter concurred, noting that the Court had not yet decided whether the media had a constitutional right to create a miscarriage of justice by poisoning the minds of potential jurors.[69]

The Supreme Court's next significant opinion on the matter was an eerie foreshadowing of *Quattlebaum*. In 1961, police arrested and jailed Walter Rideau in Calcasieu Parish, Louisiana on charges of armed robbery, kidnaping, and murder.[70] The following morning, the sheriff's department staged an "interview" of Rideau, who, flanked by two state troopers, confessed his guilt

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trial by jury *was* "fundamental in the context of the criminal processes maintained by the American States." *Id.*

61. Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462 (1907).

62. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976) ("None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and impartial jury . . . .").

63. *See id.* at 556-58 (discussing several cases involving prior restraints).

64. 366 U.S. 717 (1961).

65. The Court described the publicity as "a barrage of newspaper headlines, articles, cartoons and pictures . . . unleashed against [Irvin] during the six or seven months preceding his trial." *Id.* at 725. The trial judge granted one change of venue to the next county but, apparently because of a statutory constraint, refused a request for a further change of venue even though the new venue had been corrupted as well. *See id.* at 720.

66. *Id.* at 727.

67. *Id.* at 724, 727-28.

68. *Id.* at 728.

69. *Id.* at 730 (Frankfurter, J., concurring).

70. *See* Rideau v. Louisiana, 373 U.S. 723, 723-24 (1963).

in response to leading questions from the sheriff. This interview was filmed by a television crew.[71] During voir dire two months later, three members of the jury stated that they had seen and heard the televised confession at least once.[72] The jury, which also included two local deputy sheriffs, convicted Rideau and sentenced him to death.[73]

The Supreme Court reversed Rideau's conviction as a denial of due process when the judge refused to change venue.[74] Writing for the Court, Justice Stewart characterized the televised confession as the actual trial in the minds of the public and stated that "[a]ny subsequent court proceedings . . . could be but a hollow formality."[75] The Supreme Court held, *without requiring any showing of actual prejudice*, that due process requires that no person shall be sent to death by a jury drawn from a community exposed to a televised confession.[76]

The Supreme Court reinforced the doctrine of inherent obstruction of due process by pretrial publicity following the trial of Billy Sol Estes,[77] in which the judge allowed live radio and television broadcasts of a pretrial hearing regarding Estes's motion to prohibit the media from broadcasting and recording the proceedings.[78] In reversing Estes's later conviction, the Supreme Court condemned pretrial publicity which "may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence."[79] Writing for the Court, Justice Clark noted the *Rideau* decision "that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment *even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial.*"[80] The Court found that it had a "duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial."[81] The *Estes* Court also worried that the media might intrude into confidential attorney-client conversations and

71. *See id.* at 724-25.
72. *See id.* at 725.
73. *See id.*
74. *Id.* at 726.
75. *Id.*
76. *Id.* at 727. Justice Clark, joined by Justice Harlan, dissented. He implied that he would require a showing on the record that the adverse publicity had fatally infected the trial. *See id.* at 729 (Clark, J., dissenting). Two years later, Justice Clark reversed his view in Estes v. Texas, 381 U.S. 532 (1965). *See infra* notes 77-82 and accompanying text.
77. Estes was a nationally known financier. *See Estes*, 381 U.S. at 552 (Warren, C.J., concurring).
78. *See id.* at 535-36. Prior to the trial, massive publicity led to a change of venue that was 500 miles from the original site. *Id.* at 535. The media activities in the courtroom considerably disrupted the pretrial hearings. *Id.* at 536.
79. *Id.* at 536.
80. *Id.* at 538 (emphasis added). Justice Clark, writing for the Court, cited his dissent in *Rideau* as support for this proposition. *See id.*
81. *Id.* at 541.

consequently deprive an accused of effective assistance of counsel.[82]

One year later, the Supreme Court likewise condemned the carnival-like trial of Dr. Sam Sheppard.[83] The "trial judge did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom."[84] The *Sheppard* Court aimed most of its ire at the trial judge's refusal to exercise his authority over the courtroom and the court's officers to prevent the "carnival atmosphere."[85] Noting that "there is nothing that proscribes the press from reporting events that transpire in the courtroom,"[86] the Supreme Court in *Sheppard* suggested four actions that the trial court could have taken to mitigate the preexisting publicity: (1) continuance; (2) change in venue; (3) sequestration of the jury; and (4) a gag order on all counsel, parties, witnesses, court officials, and government employees.[87] Only the gag order was prophylactic, as it was designed to prevent further damage rather than alleviate the existing concerns. The other three actions were after-the-fact remedies suggested only as methods which might, in some circumstances, mitigate the prejudice from excessive publicity prior to trial.

The *Sheppard* Court did not imply that the foregoing options were the only ones available to a court that is in a position to prevent undue prejudicial publicity that seriously threatens the fairness of a trial. To the contrary, commenting that "reversals are but palliatives," the Court admonished trial judges to invoke "remedial measures that will *prevent* the prejudice at its *inception*. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences."[88] The press may escape such rules and regulations only so long as there is "'no threat or menace

82. *See id.* at 549.

83. *See* Sheppard v. Maxwell, 384 U.S. 333 (1966). Police suspected Sheppard of bludgeoning his wife to death at their home. *See id.* at 335-36.

84. *Id.* at 363. The Supreme Court in *Sheppard* condemned, among a host of other judicial misfeasances, the prosecutor and police leaking ostensible "evidence" to the media that was unmistakably inadmissible. "The exclusion of such evidence in court is rendered meaningless when news media make it available to the public." *Id.* at 360.

85. *Id.* at 358. Justice Clark used over 17 pages of a 30-page decision to recount the atrocious activities, led by the coroner, the prosecutor, and the judge (the latter two in the midst of a campaign for an election held two weeks after trial) in concert with the press, which combined to destroy any semblance of fairness or impartiality. Highlights included ordering the defendant to reenact the event in his home and inviting the press to photograph the staged event; denying the defendant the right to counsel during the coroner's inquest, which was held in a high school gymnasium and used loudspeakers so that the crowd of reporters and spectators could hear; filling the courtroom with reporters and photographers; placing a press room adjacent to the jury room; and only mildly asking the non-sequestered jury to ignore the massive publicity. *See id.* at 337-49, 353-57.

86. *Id.* at 362-63.

87. *See id.* at 361 (gag order); *id.* at 363 (continuance, change in venue, and sequestration).

88. *Id.* at 363 (emphasis added).

to the integrity of the trial.'"[89] A trial judge has an obligation to warn reporters as to the "impropriety" of publishing such prejudicial material.[90] The Supreme Court admonished the increasing frequency of unfair and prejudicial news commentary on pending trials:

> Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.[91]

Therefore, the *Sheppard* Court clearly envisioned a trial judge having the authority to restrain the press when necessary for a defendant to receive a fair trial.[92]

Finally, in 1976 the Supreme Court decided its first case involving a prior restraint imposed to protect a defendant's right to a fair and impartial jury. In *Nebraska Press Ass'n v. Stuart*[93] the Court decided the validity of a state court's order that had been imposed to counter an expected media frenzy regarding a pending criminal case. As such, the decision offers little to guide a trial or appellate court where the threatened publicity is more acute and the proposed remedy more precise.[94] However, *Nebraska Press* remains the only Supreme Court decision directly addressing the use of prior restraints against the media in order to protect a defendant's right to a fair trial. It established the test cited by the South Carolina Supreme Court in *Quattlebaum*.[95]

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89. *Id.* at 350 (quoting Craig v. Harney, 331 U.S. 367, 377 (1947)).

90. *See id.* at 362. The Court excluded any matters placed on the record in open court from its characterization of "impropriety." *See id.*

91. *Id.*

92. Chief Justice Warren noted in *Estes* that "the Sixth Amendment . . . not only requires that the accused have certain specific rights but also that he enjoy them at a *trial*." Estes v. Texas, 381 U.S. 532, 559 (1965) (Warren, C.J., concurring). Therefore, the trial court's duty is to "ensure" a fair trial, not merely "mitigate" influences which threaten a fair trial. *See infra* notes 164-70 and accompanying text.

93. 427 U.S. 539 (1976).

94. *See* State-Record Co. v. State (Quattlebaum), 332 S.C. 346, 357 n.21, 504 S.E.2d 592, 598 n.21 (1998) (referring specifically to the *Noriega* case, the court noted that "[a] number of commentators have recognized misapplication of the *Nebraska Press* test"), *cert. denied*, 119 S..Ct. 1355 (1999); *id.* at 361, 504 S.E.2d at 600 (Toal, J., dissenting) ("[S]uch tests really do not give meaningful and practical guidance to trial judges."); *see also* Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L.J. 259, 267 (1995-96) ("The standard created by the Supreme Court . . . has proven to be inoperable and confusing . . . .").

95. *See Quattlebaum*, 332 S.C. at 353, 504 S.E.2d at 595-96.

In *Nebraska Press*, the Nebraska Press Association and other media representatives appealed a restraining order initially imposed by a trial court following the arrest of a suspect in the murder of a small-town family.[96] As amended by the Nebraska Supreme Court, the order prohibited all media outlets from publishing any matters regarding "(a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused."[97] The order was to expire when the jury was impaneled.[98]

Writing for the Supreme Court, Chief Justice Burger opined that "pretrial publicity presents few unmanageable threats to [the] important right" to a fair trial "[i]n the overwhelming majority of criminal trials."[99] He envisioned such threats coming from sensational cases that develop "tensions . . . between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment."[100] Burger cited *Irvin*, *Rideau*, *Estes*, and *Sheppard* to outline the impermissible prejudice resulting when a trial court allows the press free rein in judicial proceedings.[101] But to determine whether a court may constitutionally restrain the media in order to prevent that impermissible prejudice, Chief Justice Burger fashioned a three-pronged test consisting of the following factors: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger."[102]

The Court agreed that the trial judge reasonably concluded that intense and pervasive pretrial publicity would exist, which could impinge upon the defendant's right to a fair trial, thus meeting the first prong.[103] But the Court faulted the trial judge for stopping there and not making findings as to "whether

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96. *See Nebraska Press*, 427 U.S. at 543. The prosecutor and defense counsel had joined in asking the trial judge to issue a restrictive order to distinguish "matters that may or may not be publicly reported or disclosed to the public." *Id.* at 542. No representative of the press attended the hearing. *Id.* The trial court apparently went beyond the motion's request to define restrictions on what the attorneys and police in the case could report or disclose and added the restraint against the media from publishing anything not countenanced by the ostensibly voluntary Nebraska Bar-Press Guidelines. *See id.* These guidelines proscribed the publication of "confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence." *Id.* at 542-43 n.1. The district court amended the order, but still prohibited the press from reporting on a wide range of matters, including the exact nature of the restrictive order itself. *See id.* at 543-44. The press associations appealed to the Nebraska Supreme Court. *See id.* at 544.

97. *Id.* at 545.

98. *See id.* at 546.

99. *Id.* at 551.

100. *Id.*

101. *See id.* at 551-53.

102. *Id.* at 562.

103. *See id.* at 562-63.

measures short of an order restraining all publication" would suffice.[104] As potential measures, the Court listed the alternatives suggested in *Sheppard*: (a) change in venue; (b) continuance to allow public attention to subside; (c) extensive voir dire; (d) sequestration of jurors; and (e) gag orders on parties, counsel, police, and witnesses.[105] Accordingly, the Court held there were neither findings nor evidence in the record sufficient to meet the second prong.[106] The Court further found that the order failed the third, "effectiveness prong."[107] In addition to failing the new three-pronged test, the order also impermissibly restricted publication of testimony produced in an open preliminary hearing.[108] Finally, the Court deemed as too vague and broad the portion of the order restricting publicity of information which would implicate the defendant.[109]

The *Nebraska Press* Court reached the right decision in a case where the order was (1) vague and broad, (2) substantially applied to information heard in open court, and (3) justified primarily by conditions which would be found in every high-visibility and sensational trial.[110] But the Court went far beyond what was necessary under the facts of the case by developing a test virtually guaranteed to sacrifice an individual citizen's right to a fair trial.[111] Further, the *Nebraska Press* Court seemed to convert the last-resort measures for mitigating damage from already existing prejudicial publicity into alternative measures which a court must take instead of "prevent[ing] the prejudice at its inception."[112] Nevertheless, the *Nebraska Press* Court grudgingly acknowledged that not all prior restraints are unconstitutional when required to protect the right to a fair trial:

> However difficult it may be, we need not

104. *Id.* at 563.

105. *See id.* at 563-64 (citing Sheppard v. Maxwell, 384 U.S. 333, 357-62 (1966)).

106. *See id.* at 565.

107. *See id.* at 565-66.

108. *See id.* at 568.

109. *See id.* In his concurrence, Justice White expressed "grave doubt . . . whether orders with respect to the press *such as were entered in this case* would ever be justifiable." *Id.* at 570-71 (White, J., concurring) (emphasis added). But three members of the Court found an absolute First Amendment right at the expense of the Sixth Amendment. *See id.* at 572 (Brennan, J., concurring) ("The right to a fair trial . . . is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right . . . .").

110. Justice Brennan fully described the process and rationale used in developing the order. *See id.* at 574-79 (Brennan, J., concurring).

111. The case could have been reversed merely because the order was vague and overly broad and because it impermissibly restrained publication of testimony presented in open court. In *Quattlebaum* the South Carolina Supreme Court agreed that the second prong, requiring that there be no other measures that would "mitigate" the effects, is an impossible standard to meet if literally applied. *See infra* notes 164-70 and accompanying text.

112. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

> rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.[113]

At best, "*Nebraska Press* left the door ajar, but only slightly, to prior restraints in other areas,"[114] although it was sufficiently open for the Utah Supreme Court to uphold a prior restraint in a criminal case in *KUTV, Inc. v. Wilkinson*.[115] While a jury was being empaneled in the trial of a defendant charged with four counts of felony theft, the trial court restrained the local media from publishing allegations that the defendant was tied to organized crime.[116] The Utah Supreme Court upheld the order after noting the meticulous fact-finding by the trial court which met *Nebraska Press*'s three-prong standard.[117] In particular, the trial court had considered and rejected alternative measures short of issuing the restraint.[118] Citing a Utah "constitutional direction that '[n]o law shall be passed to abridge or restrain the freedom of speech or of the press,'"[119] the Utah Supreme Court added a fourth prong to the *Nebraska Press* test: the public's interest in having immediate access to the information proposed to be restrained.[120] The court held that no extraordinary public interest in immediate access existed because the case did not involve a public official

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113. *Nebraska Press*, 427 U.S. at 569-70.

114. Floyd Abrams, *Prior Restraints*, *in* 3 PRACTISING LAW INST., COMMUNICATIONS LAW 35, 39 (1997).

115. 686 P.2d 456 (Utah 1984).

116. *See id.* at 458-59.

117. *See id.* at 462. The facts found by the court included: (1) unsequestered jurors were contacted during the trial and told that the defendants were connected to the Mafia; (2) the media had refused requests for voluntary constraint; (3) the information regarding purported organized crime connections was "not in the public domain," *id.* at 460, and there had been no facts presented supporting the allegation; and (4) associating the defendant with organized crime would be prejudicial. *See id.* at 459-60.

118. Rejected alternatives included: "(1) defendant's waiver of a jury trial, (2) sequestration of the jury, (3) voluntary restraint [by the media], and (4) continued admonitions to the jury [to disregard any outside information]." *Id.* at 459-60. The most obvious alternative, sequestration, was rejected because the expected length of the trial (four weeks) would create a hardship on the jurors, would be costly, and might prejudice the jurors against the defendant. *See id.* at 460. Utah Supreme Court Justice Stewart, in his dissent, rejected this argument because it would apply to any lengthy trial. *See id.* at 463 (Stewart, J., dissenting).

119. *Id.* at 461-62 (quoting UTAH CONST. art. I, § 15) (alteration in original).

120. *Id.*

or official misconduct.[121] The record reveals no further appellate consideration.

Other than *KUTV*, no court upheld a prior restraint order against publishing information already in the hands of the media for fifteen years after *Nebraska Press*.[122] Instead, First Amendment and Sixth Amendment conflicts were litigated in cases preventing media access to the information, including attending and reporting court proceedings. What the press "sees and hears in the courtroom it may, like any other citizen, publish or report consistent with the First Amendment."[123] However, the press and public may, in limited circumstances, be kept from seeing or hearing matters that transpire in the courtroom. The principles and circumstances that would justify denying the press and public access to court proceedings are illustrative of the narrow reasoning which would support a prior restraint against publication.

In *Gannett Co. v. DePasquale*[124] the Supreme Court in a 5-4 opinion held that, at the defendant's request, a court can close a pretrial hearing to adjudicate the admissibility of an allegedly involuntary confession.[125] Delivering the opinion of the Court, Justice Stewart noted approvingly that "the trial court balanced the 'constitutional rights of the press and the public' against the 'defendants' right to a fair trial.'"[126] Abatement of the press's constitutional right was justified because a "*reasonable probability* of prejudice" to the defendants existed.[127] Therefore, protecting the defendant from public disclosure of an alleged confession was a sufficient basis to restrict the media's right of access to the trial. Justice Blackmun, writing for the dissent in *Gannett*, specifically concurred with earlier decisions that would have restricted

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121. *See id.* at 462. In what certainly was a result unexpected by the petitioning news media, the Utah Supreme Court actually expanded the trial court's order. Citing *Nebraska Press*'s third prong that any order must be effective in preventing odious prejudice, the Utah Supreme Court amended the order to also prohibit publishing any information about any "*indirect*" Mafia connection, as well as any "*direct*" connection as prohibited in the original order. *Id.* at 461. For a more in depth discussion of this case, see Scott A. Hagen, Note, KUTV v. Wilkinson*: Another Episode in the Fair Trial/Free Press Saga*, 1985 UTAH L. REV. 739 (1985).

122. *See supra* notes 9-10 and accompanying text.

123. Gannett Co. v. DePasquale, 443 U.S. 368, 446 (1979) (Blackmun, J., concurring and dissenting); *see also* Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966) ("[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom."); Estes v. Texas, 381 U.S. 532, 541-42 (1965) ("[Members of the press] are always present if they wish to be and are plainly free to report whatever occurs in open court through their respective media.").

124. 443 U.S. 368 (1979).

125. *Id.* at 394.

126. *Id.* at 392.

127. *Id.* at 393 (emphasis added). The *Gannett* majority refused to decide whether the press and the public had a constitutional right to attend criminal trials. *See id.* at 392. Justice Powell concurred separately to opine that the press and public did have such a constitutional right. However, in so holding he agreed that restricting the press is justified if the defendant makes "some showing" of likely prejudice, and the press is given the opportunity to show alternative measures, short of closure, which would "*eliminate* the dangers shown" to the defendant's interests by a probable cause showing of potential prejudice to the defendant. *Id.* at 401 (Powell, J., concurring) (emphasis added).

publication of defendants' confessions and offers to plead guilty.[128] Preventing pretrial disclosure of a confession is a specific example of protecting a defendant's rights against the rights of the press.

The *Gannett* Court reaffirmed that "a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary."[129] It follows, therefore, that a trial court has more leeway to *prevent* a poisoned trial environment (an affirmative constitutional duty) than limiting itself only to those *Sheppard* and *Nebraska Press* alternatives which remain available after the environment has been poisoned.[130]

More recently, in *Gentile v. State Bar*[131] the Supreme Court reinforced the importance of preventative measures rather than reliance on remediation:

> Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome

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128. *See id.* at 444 (Blackmun, J., concurring and dissenting). Justice Blackmun agreed that pretrial disclosure "of information, determined to be inadmissible at trial, may severely affect a defendant's rights." *Id.* at 439 (Blackmun, J., concurring and dissenting). Such information "may harm irreparably, under certain circumstances, the ability of a defendant to obtain a fair trial." *Id.* (Blackmun, J., concurring and dissenting). Among the several examples Justice Blackmun listed as legitimate subordination of the free press to other values, he noted that confidentiality of the contents of intercepted communications could be protected until the lawfulness of the interception was ascertained. *See id.* at 439-40 (Blackmun, J., concurring and dissenting). All of this "illustrate[s] that courts have been willing to permit limited exceptions to the principle of publicity where necessary to protect some other interest." *Id.* at 440 (Blackmun, J., concurring and dissenting). Justice Blackmun also distinguished between disclosures of "the contents of a confession or of a wiretap, or the nature of the evidence seized" on the one hand, and adjudication of the issues regarding how the disputed evidence was obtained on the other. *Id.* at 442 (Blackmun, J., concurring and dissenting). He suggested that carefully crafted proceedings would protect the right of a free press to report the latter, while still maintaining confidentiality to protect the defendant's rights in the former. *See id.* (Blackmun, J., concurring and dissenting).

129. *Id.* at 378 (citation omitted).

130. *Gannett* affords useful analogies to the *Quattlebaum* quandary. Both cases deal with the conflict between the First Amendment rights of a free press and a defendant's right to a fair trial, both address pretrial publicity where the potential jury pool cannot be shielded, and both involve the potential release of specifically defined, potentially very damaging information. Both also pertain to information to which the public and the press did not have an independent right (suppression hearing transcripts in *Gannett*, attorney-client privileged communication in *Quattlebaum*), and in both cases the defense and prosecution each agreed to the court's proposed action. *See id.* at 375; Record on Appeal at 40 State-Record Co. v. State (Quattlebaum), 332 S.C. 346, 504 S.E.2d 592 (1998), *cert. denied*, 119 S. Ct. 1355 (1999) (No. 95-GS-32-0669). Finally, both cases deal with the opportunities available to courts to implement very narrow and specific prophylactic measures to prevent undue and unnecessary prejudice rather than attempts to mitigate prejudice.

131. 501 U.S. 1030 (1991).

> affected by extrajudicial statements would violate that fundamental right. Even if a fair trial can ultimately be ensured through *voir dire*, change of venue, or some other device, these measures entail serious costs to the system. Extensive *voir dire* may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by petitioner.[132]

As summarized by the *Quattlebaum* court, the *Sheppard* and *Nebraska Press* measures for maintaining an impartial jury impose tremendous costs on the defendant, the courts, and the public and have questionable effectiveness.[133] The importance of the right to an impartial jury, the potentially devastating effect of especially aggravating, non-admissible information, and the shortcomings and costs of the so-called "remedial measures," can, though only rarely, reach that critical mass where a defendant's right to an impartial jury outweighs the press's right to publish especially aggravating, prejudicial information.[134] Yet, criminal defendants not only have the right to impartial juries in order to obtain fair trials, they also have other rights, both constitutional and constitutionally based, that are endemic to the American justice system. Part V discusses these rights and their impact on facts such as those found in *Quattlebaum.*

V. NARROWING THE SCOPE: A FREE PRESS, FAIR TRIALS, AND THE ATTORNEY-CLIENT PRIVILEGE

Two amendments to the United States Constitution specifically delineate four "private rights" guaranteed to every citizen whose life, liberty, or freedom are at stake in a criminal trial. Those rights are (1) the Fifth

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132. *Id.* at 1075.

133. *See Quattlebaum*, 332 S.C. at 355 n.18, 356 n.19, 504 S.E.2d at 597 nn.18 & 19.

134. The *Nebraska Press* Court explicitly recognized this possibility:

> However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty [of irreparable prejudice] to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976), *quoted in Quattlebaum*, 332 S.C. at 355, 504 S.E.2d at 597.

Amendment right against self-incrimination;[135] (2) the Fifth Amendment right to due process;[136] (3) the Sixth Amendment right to a fair trial that is speedy, public, and tried by an impartial, local jury;[137] and (4) the Sixth Amendment right to effective assistance of counsel for that trial.[138] The importance and application of these four rights exist independently of one another, and each is a vital part of the Bill of Rights.[139] A fair trial depends on the unmitigated quality of each of these rights. Yet, prior to 1990 nearly every historical reference to the right to a "fair trial" focused solely on the right to an "impartial jury" without addressing the criminal defendant's other three specific constitutional rights that are essential for a fair trial.

In 1990, the three other constitutional elements required for a fair trial—due process, the right against involuntary self-incrimination, and effective assistance of counsel—coalesced in a media challenge to the attorney-client privilege of confidentiality. Cable News Network (CNN) obtained audiotapes of telephone conversations held between Panamanian General Manuel Noriega and his defense counsel while Noriega was detained in a Florida federal prison awaiting trial.[140] The tapes were made by prison officials and then obtained by CNN through unknown means.[141] On a motion by defense counsel, the district court ordered CNN to produce the tape and to restrain from

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135. "No person shall be ... compelled in any criminal case to be a witness against himself...." U.S. CONST. amend.V.

136. "No person shall be... deprived of life, liberty, or property, without due process of law...." *Id.*

137. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." *Id.* amend. VI.

138. "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence." *Id.*

139. It is possible to maintain protection against self-incrimination and still not have a fair trial. It is possible to enjoy effective assistance of counsel and still not have a fair trial. It is possible to have a speedy and public trial and still not have a fair trial. And it is possible to empanel an impartial, local jury and still not have a fair trial.

140. *See* United States v. Noriega (Noriega II), 917 F.2d 1543, 1545 (11th Cir. 1990) (per curiam).

141. *See id.* In its initial hearing where it issued the order, the district court deferred the extensive evidentiary hearing that would have been required to determine if the attorney-client privilege had been waived and assumed that the privilege had not been waived. *See* United States v. Noriega (Noriega III), 752 F. Supp. 1045, 1047 (S.D. Fla. 1990). Nevertheless, the Eleventh Circuit assumed that Noriega had signed a valid release reflecting his understanding that the prison officials would be recording all conversations, including those with his attorney. *See Noriega II*, 917 F.2d at 1551. The court noted that such a release to one element of the government (the prison) did not necessarily serve as a release to another element (the prosecutor). *See id.* at 1551 n.10. In subsequent proceedings, the district court found that General Noriega's "release" specifically stated that "[c]alls to an attorney, made according to the rules, [would] not be monitored" and that the prison's associate warden assured Noriega's counsel that maintaining the attorney-client privilege would not be a problem. *Noriega III*, 752 F. Supp. at 1047.

publishing its contents until they were reviewed by a magistrate.[142] In its decision, the district court held that the attorney-client privilege, though not a constitutional right, assumes a constitutional aspect to effectuate a criminal defendant's Sixth Amendment right to effective assistance of counsel.[143] The privilege serves two purposes—to allow uninhibited communication between the defendant and counsel and to prevent disclosure of information contained in such communications that would damage the case.[144] Finding that the first purpose was already impeded because Noriega knew the conversations were monitored, the district court restricted the issue to CNN's right to publish versus Noriega's right to a fair trial (omitting consideration of Noriega's right to private communication with his defense counsel).[145] However, the threat of prejudice to Noriega's right to a fair trial was sufficient enough to impose a temporary restraint pending review of the tapes, especially because the tapes could have revealed trial strategy and protected confidences.[146]

CNN petitioned the Eleventh Circuit for relief.[147] In a per curiam decision dated only one day after the original order, the Eleventh Circuit refused to stay the order.[148] In its decision, the court considered freedom of the press, fair trial, privacy, and attorney-client privilege issues. Noting the obligation of trial judges to effectuate the fair-trial guarantee of the Sixth Amendment, the Eleventh Circuit, citing the Second Circuit's statement that "[w]hen the exercise of free press rights actually tramples upon Sixth Amendment rights, the former must nonetheless yield to the latter,"[149] granted broad discretion to trial judges to place restrictions on persons involved in proceedings "despite the fact that such restrictions might affect First Amendment considerations."[150] But the Eleventh Circuit eschewed the *Nebraska Press* three-pronged test. Instead, it applied the standards for closing

142. United States v. Noriega (Noriega I), 752 F. Supp. 1032, 1034-35, 1036 (S.D. Fla.), *aff'd*, 917 F.2d 1543 (11th Cir. 1990) (per curiam). The district judge ordered the tapes to be reviewed by a magistrate, instead of by himself, so that he would not have to recuse himself because of exposure to privileged attorney-client communications. *Id.* at 1034-35.

143. *See id.* at 1033.

144. *See id.*

145. *See id.* Though unstated by the district court, at the time of this decision, most courts would not have applied the privilege to any communication that had been revealed to third parties not encompassed by the privilege, including eavesdroppers and thieves. *See* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 9.6, at 456 (3d ed. 1996). In modern times, courts are becoming less draconian as to "stolen" communications, and even to some inadvertently released communications, and the Advisory Committee Notes to the Proposed Federal Rules of Evidence would protect the privilege against eavesdroppers and thieves. *See id.* § 9.6, at 457 (citing FED. R. EVID. 503(a)(4), (b), & advisory committee's note).

146. *See Noriega I*, 752 F. Supp. at 1034-35.

147. United States v. Noriega (Noriega II), 917 F.2d 1543 (11th Cir. 1990) (per curiam).

148. *See id.* at 1552.

149. *In re* Dow Jones & Co., 842 F.2d 603, 609 (2d Cir. 1988), *cited in Noriega II*, 917 F.2d at 1548.

150. *Noriega II*, 917 F.2d at 1548.

a hearing from *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*,[151] which require "first, . . . a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure[, in this case being prior restraint,] would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."[152] Although the Eleventh Circuit was faced with CNN's refusal to produce the tapes, and thus neither it nor the district court could review their contents,[153] the court found that the threat of prejudice from revealing private, attorney-client communications merited restraint based solely on the character of the communications, even without consideration of their actual contents.[154] The United States Supreme Court denied certiorari.[155]

VI. THE *QUATTLEBAUM* DECISION: RECONCILING THE CONSTITUTIONAL FORCES

CNN's conduct in *Noriega* vindicated Justice Stevens's deciding vote in *Nebraska Press* to refuse to extend constitutional protection to anything the media may covet publishing "no matter how shabby or illegal the means by which the information is obtained, [and] no matter how serious an intrusion on privacy might be involved."[156] The *Quattlebaum* videotape illustrates that *Noriega* is not an isolated event.[157] While the precedents and guidance from the United States Supreme Court have been muddled, the South Carolina Supreme Court answered the issue by faithfully discerning what the highest Court has—and has not—previously held.

The media petitioners in *Quattlebaum* asked the court to choose between the media's First Amendment publication rights and Quattlebaum's Sixth Amendment right to a fair trial.[158] The *Quattlebaum* court noted that the *Nebraska Press* Court declined to assign priorities between freedom of the

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151. 478 U.S. 1 (1986).

152. *Id.* at 14; *see Noriega II*, 917 F.2d at 1549.

153. The court chastised CNN for asking for the court's relief while refusing to provide the court the information necessary to balance the interests. *See Noriega II*, 917 F.2d at 1547, 1552.

154. *See id.* at 1552.

155. Cable News Network, Inc. v. Noriega, 498 U.S. 976 (1990). Justices Marshall and O'Connor would have granted the stay application and the petition for certiorari due to the "extraordinary consequence for freedom of the press." *Id.* at 976 (Marshall, J., dissenting). Subsequently, the district court denied the issuance of a permanent injunction. *See* United States v. Noriega (Noriega III), 752 F. Supp. at 1045, 1054 (S.D. Fla. 1990).

156. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 617 (1976) (Stevens, J., concurring).

157. *Noriega* is the only case prior to *Quattlebaum* involving media disclosure of attorney-client privileged communication. State-Record Co. v. State (Quattlebaum), 332 S.C. 346, 350 n.11, 504 S.E.2d 592, 594 n.11 (1998), *cert. denied*, 119 S. Ct. 1355 (1999).

158. *See Quattlebaum*, 332 S.C. at 350, 504 S.E.2d at 594.

press and the right to a fair trial[159] and specifically refused to ban all prior restraints which might be needed to protect fair trial rights.[160] The majority in *Quattlebaum* could conceive of no other type of situation in which a defendant's right to a fair trial could be so jeopardized, and so preventable, as in the case before it.[161] Either a prior restraint was justified under the circumstances found in *Quattlebaum*, or prior restraints could never be justified under any circumstances.[162] Because the United States Supreme Court "has consistently rejected the proposition that a prior restraint can never be employed,"[163] the *Quattlebaum* court correctly held that a prior restraint was justified to prevent publication of the privileged conversation between a criminal defendant and his defense counsel.

In reaching its conclusion, the *Quattlebaum* court paid homage to the *Nebraska Press* three-pronged test.[164] The court easily disposed of the first and third prongs, holding that the publication would be highly prejudicial and that the restraint would effectively prevent that prejudice.[165] As to the second prong, the court found that the Supreme Court's refusal to ban all prior restraints was irreconcilable with its seemingly literal requirement to find that no other measures "would be likely to mitigate" the prejudice.[166] Mitigate means only to "lessen," not necessarily to eliminate.[167] Therefore, any action by the court, no matter how meaningless, would to some degree "mitigate" prejudice regardless of its remaining virulence. The *Quattlebaum* court concluded that the *Nebraska Press* Court left intact trial courts' responsibility to *ensure* criminal defendants fair trials.[168] Trial courts sit to guarantee fair trials, not merely to strive for them. Without rejecting the *Nebraska Press* test, the *Quattlebaum* court found it irrelevant to the circumstances before it.[169] The *Quattlebaum* court concluded that any other measures might have "alleviated" the prejudice, but could never *guarantee* Quattlebaum's right to a fair trial.[170]

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159. *See id.* at 351-52, 504 S.E.2d at 595.

160. *See id.* at 355, 504 S.E.2d at 596-97.

161. *See id.* at 358-59, 504 S.E.2d at 598-99. The court hinted at the nature of the attorney-client conversations contained in the recording by protesting that it was "impossible . . . to accurately portray the potential prejudice to Quattlebaum" without actually disclosing the contents of the videotape. *Id.* at 358 n.23, 504 S.E.2d at 598 n.23.

162. *Id.* at 358, 504 S.E.2d at 598-99.

163. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 570 (1976), *quoted in Quattlebaum*, 332 S.C. at 355, 504 S.E.2d at 597.

164. *See Quattlebaum*, 332 S.C. at 353-56, 504 S.E.2d at 595-97.

165. *See id.* at 353-54, 504 S.E.2d at 596.

166. *See id.* at 354 n.16, 504 S.E.2d at 596 n.16.

167. *See* BLACK'S LAW DICTIONARY 1002 (6th ed. 1990).

168. *See Quattlebaum*, 332 S.C. at 355, 504 S.E.2d at 597.

169. *See id.* at 356, 504 S.E.2d at 597 (stating that the United States Supreme Court did not intend for the right to a fair trial to be jeopardized by the media's disclosure of attorney-client privileged conversations).

170. *See id.* at 353 n.14, 356, 504 S.E.2d at 596 n.14, 597. The *Quattlebaum* court effectively adopted the *Irvin*, *Rideau*, and *Estes* doctrine that some threats to a fair trial are so inherently prejudicial as to mandate summary judicial action without requiring a finding that the

The South Carolina Supreme Court resisted the temptation to cite *Noriega* as a carte blanche license to approve the prior restraint involved in *Quattlebaum*. However, the *Quattlebaum* court could find comfort (if not refuge) in its knowledge that the trial court in *Noriega* issued its restraining order without any preliminary showing of specific prejudice as required by the *Nebraska Press* test.[171] The Supreme Court's decision to leave the *Noriega* order undisturbed supported the *Quattlebaum* court's departure from blind, literal application of the *Nebraska Press* test in all circumstances.[172] The court found it was not limited by *Nebraska Press* where the publication to be restrained consisted of attorney-client privileged communications because divulging such communications to the public jeopardizes defendants' Sixth Amendment right to effective assistance of counsel as well as their right to an impartial jury—two separate aspects of their right to a fair trial.[173]

Justice Toal delivered the sole dissent to the *Quattlebaum* decision upholding the prior restraint.[174] Justice Toal prefaced the dissent by describing the benign nature of the restraint being appealed: It was not a "restraint of the expression of an opinion[, and it was] not a permanent restraint on the publication of the attorney-client conference."[175] She also noted that the Constitution's Framers restricted only the legislative branch from restricting free speech and a free press;[176] the Supreme Court did not extend the prohibition to judicial prior restraints until 1968 when it struck down a judicial order forbidding public rallies by a white supremacist organization.[177] Justice Toal joined the majority in questioning whether courts are required to use the

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prejudice had been mitigated. The *Nebraska Press* Court did not overrule this line of cases and indeed found them "instructive." *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 551-54 (1976). The right to a fair trial, in these cases, was preeminent and not subject to surrogates. The *Quattlebaum* court did not analyze the specific alternatives suggested as "remedial" measures in *Sheppard* and proposed as "alternative" measures in *Nebraska Press*. Instead, the court chronicled the shortcomings inherent in each of the proposed alternatives. *See Quattlebaum*, 332 S.C. at 355 n.18, 504 S.E.2d at 597 n.18.

171. *See Quattlebaum*, 332 S.C. at 357, 504 S.E.2d at 598.

172. *See id.* at 356-57, 504 S.E.2d at 597-98.

173. *See id.*

174. *See id.* at 359-70, 504 S.E.2d at 599-605 (Toal, J., concurring and dissenting). Justice Toal concurred with the majority's discussion of subject matter jurisdiction and personal jurisdiction, and she dissented as to the validity of the prior restraint. *See id.* (Toal, J., concurring and dissenting).

175. *See id.* at 359, 504 S.E.2d at 599 (Toal, J., concurring and dissenting).

176. *See id.* (Toal, J., concurring and dissenting); *see also* U.S. CONST. amend. I ("*Congress* shall make no law . . . abridging the freedom of speech, or of the press . . . .") (emphasis added).

177. *See Quattlebaum*, 332 S.C. at 360 n.2, 504 S.E.2d at 599 n.2 (Toal, J., concurring and dissenting); *see also* Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968). In *Carroll* the Court reemphasized the presumptive unconstitutionality of any prior restraint, but acknowledged that judicial prior restrains could be necessary, as long as procedural safeguards prevent the dangers of a system of censorship. *See id.* at 181.

same analysis (the *Nebraska Press* test) in assessing all judicial restraints.[178] Specifically, she asked if it matters whether, in addition to preventing premature publicity about issues to be considered during a trial, a court "seeks to safeguard such constitutional values . . . as the protection against self-incrimination, the right to an attorney of the defendant's choosing, and the right to a speedy trial."[179] However, although she forecasted an approach more sympathetic to the right to a fair trial, Justice Toal decided that judicial precedents mandated otherwise.[180]

Justice Toal agreed with the majority opinion that *Nebraska Press* provides an inadequate standard for evaluating cases such as *Quattlebaum*.[181] After also agreeing that the second prong of the *Nebraska Press* test cannot be read in isolation, she rejected the majority's abandonment of the test under these circumstances, recognizing instead that it should be applied as a balancing test, having the court consider the degree to which other measures might mitigate the adverse effects of pretrial publicity.[182] However, as Justice Toal acknowledged, this purported "balancing" test is in fact weighed almost totally against the criminal defendant.[183]

Criminal defendants have "'the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied.'"[184] Yet the Sixth Amendment guarantee of an impartial jury is the government's obligation, not the accused's.[185] The burden always remains on the court to guarantee a fair trial, not on the defendant. But the dissenting opinion in *Quattlebaum* suggests that unless the defendant proves under *Nebraska Press* that the defendant *will be* denied a fair trial, a prior restraint cannot be imposed. The dissenting opinion justifies this outcome because prior restraints on the press are immediate and profound, whereas the prejudice to the defendant and the criminal justice system is only a matter of probability.[186] Yet even a "probability" of an unfair trial is unacceptable.[187] Furthermore, Justice Toal

178. *See Quattlebaum*, 332 S.C. at 360, 504 S.E.2d at 599-600 (Toal, J., concurring and dissenting).

179. *Id.* at 360, 504 S.E.2d at 600 (Toal, J., concurring and dissenting).

180. *See id.* at 361, 368, 504 S.E.2d at 600, 604 (Toal, J., concurring and dissenting).

181. *See id.* at 368, 504 S.E.2d at 604 (Toal, J., concurring and dissenting).

182. *See id.* at 363, 504 S.E.2d at 601 (Toal, J., concurring and dissenting).

183. *See id.* at 364, 504 S.E.2d at 601 (Toal, J., concurring and dissenting) ("The presumption . . . is heavily in favor of using alternative measures.").

184. *Id.* (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976)).

185. *See* United States v. Noriega (Noriega II), 917 F.2d 1543, 1550 (11th Cir. 1990) (per curiam).

186. *Quattlebaum*, 332 S.C. at 368, 504 S.E.2d at 603 (Toal, J., concurring and dissenting). The dissent did not overtly disagree with the majority's conclusion that, "[a]lthough other measures *may* have . . . mitigated the effects of pretrial publicity, the *only* measure certain to ensure Quattlebaum's fundamental right to a fair trial was imposition of the prior restraint." *Id.* at 353 n.14, 504 S.E.2d at 596 n.14.

187. "A forecast of future difficulty is by definition uncertain, but equally uncertain is the rejection of that forecast. . . . It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." Belo Broad. Corp.

recognized that it is unrealistic for a trial court to make detailed findings on all available alternatives, as *Nebraska Press* seems to require.[188] "If a trial judge has to eliminate all other alternatives (a crystal ball exercise since none of the 'alternatives' will have been put into play), then in reality there exists an absolute prohibition against any prior restraint."[189] Such a requirement would diminish a criminal defendant's right to a fair trial from a guarantee to a probability, enabling society to impose on the individual citizen (the criminal defendant) the entire cost of society's generalized interest in absolute freedom of the press. However, our political system rests on the premise of individual dignity.[190] All members of society must share equally in the costs of maintaining societal interests and must not place the burden on any one citizen.

Justice Toal interpreted *Nebraska Press* as an absolute prohibition against any prior restraints even though the Supreme Court specifically rejected such an interpretation.[191] She found that the *Nebraska Press* Court "effectively established the constitutional doctrine that the First Amendment trumps the Fifth, Sixth, and Fourteenth Amendments."[192]

Justice Toal also asserted that protecting the attorney-client privilege is significant only to the extent that the conversation may be revealed to the prosecution, that any potential revelation will be prejudicial, and that no other less intrusive alternatives would be available to mitigate the expected prejudicial revelation.[193] By implication, if restraining publication would not prevent the material from falling into the prosecution's hands (as it already had in *Quattlebaum*),[194] then no reason to restrain publication exists. Justice Toal reached this conclusion by examining the inquiry purportedly mandated by the Eleventh Circuit in *Noriega II*,[195] but this mandate is illusory.[196] The Eleventh

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v. Clark, 654 F.2d 423, 431 (5th Cir. Unit A Aug. 1981); *see also* Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("[T]rial courts must take strong measures to ensure that the balance is never weighed against the accused.").

188. *Quattlebaum*, 332 S.C. at 361, 504 S.E.2d at 600 (Toal, J., concurring and dissenting).

189. *Id.* (Toal, J., concurring and dissenting).

190. *See* Irvin v. Dowd, 366 U.S. 717, 721 (1961) (stating that trial by jury is the most priceless safeguard for the preservation of "individual liberty and the dignity and worth of every man").

191. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569-70 (1976) ("However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint.").

192. *Quattlebaum*, 332 S.C. at 361, 504 S.E.2d at 600 (Toal, J., concurring and dissenting).

193. *See id.* at 369-70, 504 S.E.2d at 604-05 (Toal, J., concurring and dissenting).

194. *See id.* at 361, 504 S.E.2d at 600 (Toal, J., concurring and dissenting) ("The prosecution retained the tape for over a year unbeknownst to defendant or his lawyer.").

195. *See id.* at 369, 504 S.E.2d at 604 (Toal, J., concurring and dissenting).

196. The confusion derives in part from Justice Toal's reliance on a misapplication of the district court's summary of the language actually employed by the Eleventh Circuit and partially from Justice Toal's attributing to the Eleventh Circuit a doctrine that emanated solely from the district court. She quoted: "'[T]he fact that conversations may or may not fall within

Circuit did not constrain the inquiry to whether the confidential conversations would be revealed to the prosecution. The district court judge in *Noriega III* proposed this test. He did not attribute it to the Eleventh Circuit, and the Eleventh Circuit did not address it.[197] Justice Toal was certainly justified in raising an issue presented by an esteemed federal district judge, but attributing the mandated inquiry to the Eleventh Circuit was a mistake.[198]

By focusing solely on the actual prejudice to one specific defendant, Justice Toal overlooked the irreparable damage to the judicial system that permitting the press to divulge attorney-client confidences would cause. In *Noriega II* the Eleventh Circuit stated that "[t]he purpose of the attorney-client privilege is to encourage open and complete communication between a client and his attorney by eliminating the possibility of subsequent compelled disclosure of their confidential communications."[199] If defendants cannot trust their confidences to be kept secret, then the privilege serves no purpose, and the broader public interests are sacrificed. Not only will the defense counsel be unable to defend competently their clients in contested trials, but they would also be unable to advise their clients when pleading guilty or when otherwise cooperating with the prosecution might be appropriate. Therefore, even if a restraint on publication would not prevent the prosecution's access to confidential material in a case such as *Quattlebaum*, failure to restrain the

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the protections of the [attorney-client] privilege has no bearing on whether Noriega's right to an impartial jury will be clearly and irreparably harmed by publication.'" *Id.* (Toal, J., concurring and dissenting) (alteration in original) (quoting United States v. Noriega (Noriega III), 752 F. Supp. 1045, 1051 (S.D. Fla. 1990)). The district court quoted by Justice Toal cited the Eleventh Circuit's opinion, but the Eleventh Circuit actually stated: "Even if the attorney-client communications in this case were determined *not* to be privileged, the District Court may decide that the disclosure of these communications would constitute an impediment to Noriega's fair trial." United States v. Noriega (Noriega II), 917 F.2d 1543, 1549-50 (11th Cir. 1990) (per curiam). The Eleventh Circuit suggested that factors supporting a prior restraint include "whether the matter under scrutiny historically has been open to the press and the public" and noted that communications between a criminal defendant and his defense counsel have historically been deemed private, even where they may not be privileged. *Id.* at 1547 n.6. Therefore, as the district court properly noted, the material may be restrained from publication even if it is not privileged. *See Noriega III*, 752 F. Supp. at 1051.

197. The remainder of the quote cited by Justice Toal does limit the inquiry to the impact of the prosecution learning the contents of the privileged conversations: "'Guaranteeing Noriega's right to counsel involves an equally serious but much *narrower* inquiry. There, the court is concerned only with the extent to which the publication of legitimately privileged communications would prejudice Noriega's defense were those protected conversations to fall into the hands of the prosecution.'" *Quattlebaum*, 332 S.C. at 369, 504 S.E.2d at 604 (Toal, J., concurring and dissenting) (quoting *Noriega III*, 752 F. Supp. at 1051-52). This part of the quote from the district court is not attributed to the Eleventh Circuit.

198. In determining whether the restraint should be issued solely because of the "privileged" nature of the conversation, the Eleventh Circuit would inquire only as to whether the client intended the conversation to remain confidential and whether the client actually understood and could reasonably expect, under the circumstances, that the conversation would remain confidential. *See Noriega II*, 917 F.2d at 1551.

199. *Id.* at 1550.

media from publishing attorney-client confidences would severely jeopardize society's interest in the free flow of communication necessary for attorneys to provide sound advice to their clients.

Justice Toal remained silent regarding an ironic aspect of *Quattlebaum* that implicates the policy of the attorney-client privilege. If the defendant had not been protected by the attorney-client privilege guaranteed by the judicial system, the defendant most likely would not have engaged in the conversation which the media sought to expose. In other words, without the privilege, the conversation would not have existed.[200] If the media could not have possessed the information but for the unique attributes of the judicial system which fostered its creation, then the First Amendment should not guarantee the media the right to publish that information.[201] The correct inquiry in balancing societal interests with the freedom of the press is whether the judicial process, which both generates the information and seeks to restrict its publication, furthers "'an important or substantial governmental interest unrelated to the suppression of expression' and whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'"[202]

Justice Toal also implied that once the media possess any information, courts are powerless to prevent them from publishing it.[203] Yet legislative, judicial, and executive prior restraints of the press abound. The press can be prohibited from publishing copyrighted material in order to protect a private citizen's property interests in that material.[204] The Federal Trade Commission can prohibit the publication of advertising considered contrary to the public interest.[205] And the state can legislatively prohibit the publication of photographs that expose a race to contempt on the theory that such publication may be libelous or conducive to a breach of the peace.[206] The importance of these interests both to individuals and to society at large is pale in comparison

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200. This is a reason the attorney-client privilege does not truly hamper a prosecutor from obtaining evidence—there is no evidence but for the privilege. *See* Swidler & Berlin v. United States, 118 S. Ct. 2081, 2086-87 (1998). The prosecutor's loss is "more apparent than real," *id.* at 2087, and so is the media's loss in *Quattlebaum*.

201. *Cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) (upholding a trial court's granting of discovery to a newspaper regarding a religious organization and its leaders who had sued the newspaper, but prohibiting the newspaper from publishing any information so obtained until and unless the information was admitted during trial proceedings).

202. *Id.* at 32 (alteration in original) (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).

203. State-Record Co. v. State (Quattlebaum), 332 S.C. 346, 367, 504 S.E.2d 592, 603 (1998) (Toal, J., concurring and dissenting) ("[W]hile it may be permissible for a court to restrict some First Amendment freedoms [e.g., gag orders on court officials and parties] in order to protect a defendant's right to a fair trial, it is almost never acceptable for a court to impose a prior restraint."), *cert. denied*, 119 S. Ct. 1355 (1999).

204. *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562 (1977) (involving the unlawful appropriation of a performer's act).

205. *See supra* note 54 and accompanying text.

206. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

to the rights to a fair trial with an impartial jury, to effective assistance of counsel, and to constraining involuntary self-incrimination.

Justice Toal's dissent in *Quattlebaum* summarizes the absolutist approach to the First Amendment, but the majority opinion in *Quattlebaum* adheres more closely to the Supreme Court's long tradition of enforcing the Sixth Amendment right to a fair trial as well as the specific principles of *Nebraska Press*. To do so, the majority carefully, but not tortuously, distinguished the facts and the applicable law in *Quattlebaum* from *Nebraska Press*. Part VII of this Note seeks to make that task easier for future courts.

VII. A PER SE STANDARD TO PROTECT ATTORNEY-CLIENT CONFIDENCES

The majority in *Quattlebaum* struggled with the *Nebraska Press* test, considered its application to be "uncertain" following the *Noriega* case, and expressed hope that the United States Supreme Court would develop an alternative standard.[207] The dissent likewise expressed frustration with not having "a more suitable test."[208] The United States Supreme Court need not overrule *Nebraska Press* in order to develop a more specific standard applicable to the unique circumstances in which a defendant seeks to enjoin media publication of attorney-client confidences. But until the Court develops such a standard, the following steps for protecting the interests of both the public and criminal defendants might be useful.

The practical effect of *Noriega* is a new rule narrowly applicable to private communications between criminal defendants and their attorneys.[209] Once a criminal defendant has made a prima facie case that the information sought to be published is a private communication with defense counsel, then its prejudicial effect on the defendant's right to a fair trial under the Sixth Amendment is presumed to outweigh any right of the press to publish the information under the First Amendment.

The media remain free to publish whatever they wish until and unless a threatened party files an action to prevent publication of specific information endangering that party's constitutional rights.[210] That party would have the burden of making a prima facie showing that (1) criminal prosecution is pending; (2) the contents of private, attorney-client communications related to that prosecution are in the hands of a third party, particularly a media outlet, without consent or authority; and (3) there exists reasonable cause to believe

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207. *See Quattlebaum*, 332 S.C. at 357, 358, 504 S.E.2d at 598.

208. *Id.* at 368, 504 S.E.2d at 604 (Toal, J., concurring and dissenting).

209. The author does not necessarily exclude application of the rule to civil cases, but limits its justification here to the constitutional guarantees afforded criminal defendants.

210. Thus, a criminal defendant facing loss of property, imprisonment, or even death would be on at least an equal footing with a publisher seeking to protect its economic interests in copyrighted material. *See generally* Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 *passim* (1998) (discussing the interplay between copyright law and the right to free speech).

that the third party may disseminate the information. The burden then rightfully falls on the third party (the media), not on the defendant. If the third party fails to demonstrate that the communication does not fall within the ambit of attorney-client-privileged communications under the jurisdiction's rules, then the publication may be restrained until such time that the communication is no longer privileged. If the media succeed in demonstrating that the material is not protected by the attorney-client privilege, then the burden shifts to the movant (the criminal defendant) to demonstrate that other constitutional interests and rights outweigh the media's free press rights.[211]

To determine if confidential but non-privileged communications may be published, the court should evaluate the competing interests (society's, the defendant's, and the media's) using a test patterned after *Noriega II*,[212] *KUTV, Inc. v. Wilkinson*,[213] and the public interest inquiry in *Procunier v. Martinez*.[214] The restraint on the media should be issued, if (1) there is a substantial probability that the defendant's right to a fair trial will be prejudiced by the publication of the private communication between the defendant and defense counsel, (2) there is a substantial probability that restraining publication of the private communication would prevent the prejudice that would otherwise occur, and (3) the economic and noneconomic costs to the public and to the defendant of alternative measures which otherwise would be necessary to guarantee a fair trial outweigh the public's interest in the unhindered publication of the information at issue. Either party would have the right to appeal the decision,[215] with the press entitled to automatic, expedited appellate review. Criminal defendants would have standard appellate and extraordinary writ procedures available.

Under the foregoing procedure, any communication still protected by the attorney-client privilege will remain sacrosanct. This protection is essential to maintain the institution of attorney-client privilege and the public interests it serves. If the material is not protected by the attorney-client privilege, but is otherwise a product of a confidential attorney-client relationship, then the prejudicial impact of the contents would be a factor. In these cases, the burden would fall on the defendant to demonstrate probable prejudice that could not be, with a high degree of certainty, sufficiently mitigated by reasonable

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211. To that end, public interests may also be weighed. Thus, the media may assert the public's interest in a free press, and criminal defendants may assert the public's interest in a fair and efficient trial system. Further, the media must show that any alternative measures will not merely mitigate the prejudice, but will actually eliminate the dangers to the defendant's rights. Gannett Co. v. DePasquale, 443 U.S. 368, 401 (1979) (Powell, J., concurring).

212. United States v. Noriega (Noriega II), 917 F.2d 1543, 1549 (11th Cir. 1990) (per curiam).

213. 686 P.2d 456, 461-62 (Utah 1984).

214. 416 U.S. 396, 413 (1974).

215. Independent review prevents prejudiced or erroneous deprivation of constitutional rights by trial court fact-finders. Volokh & McDonnell, *supra* note 210, at 2431-32.

alternatives. Under no circumstances could the information be published unless the court ensures that alternative measures are taken to guarantee the defendant a fair trial.

VIII. CONCLUSION

The freedoms guaranteed by the Bill of Rights normally coexist quietly, serving as a collection of solid foundations upon which the American experiment is constructed. The First Amendment guarantees not only that individuals may speak their minds, but ensures the public a free press to share and to disseminate knowledge, opinions, and ideas. The primary purpose of the First Amendment is self-preservation of the public's liberty by assuring free discourse on the affairs of the government. The most certain guarantor of the First Amendment is the press's freedom, on a daily basis, to publish whatever it wishes without requiring prior approval from that government. But this freedom is not a license to trample on individual rights which are guaranteed by the Constitution in inks just as bold and words just as forceful as those in the First Amendment.

Individual citizens have at least equal standing with the press to protect their rights. Those rights include the Sixth Amendment right to a fair trial that is speedy, public, and held before an impartial, local jury with the effective assistance of counsel. Unlike the press's freedom to publish, the Supreme Court has consistently held these rights to be absolute.

The courts must seek a way to guarantee the respective rights of all parties, which was the worthy objective of the *Nebraska Press* test. But when one right unavoidably clashes with another, the courts must balance society's interests to determine which will prevail and which will yield. Society's interest in the First Amendment is primarily the protection of freedom to know and to criticize the affairs of government. Society's interests are equally founded in a fair and effective judicial system centered on the Sixth Amendment's unique imperative mandating that the government guarantee every citizen a fair trial. Those two principles very rarely clash, but when they do, the rights of individual citizens coupled with society's interest in fair trials trumps even the press's right to disclose freely all aspects of governmental corruption.

Other rights held by every citizen, beyond the right to an impartial jury, are essential to fulfilling the guaranteed right to a fair trial. These include the rights to due process, freedom from compulsory self-incrimination, and effective assistance of counsel. All are jeopardized when any party, especially the media, seeks to divulge the contents of attorney-client confidences. Society's interests are especially served by preserving not just specific episodes of individual citizens, but also by protecting the institutions that maintain the fairness and effectiveness of the judicial system. The attorney-client privilege is among those institutions.

The *Quattlebaum* majority effectively balanced these interests. It

adhered to the principles found in the Supreme Court's long history of protecting both First and Sixth Amendment rights, including those underlying the *Nebraska Press* standard. It did so, though, by distinguishing the extraordinary attempt to disclose unlawfully recorded, specific attorney-client conversations from the *Nebraska Press* test designed to adjudicate the threat of massive, but generalized and lawfully obtained, pretrial publicity. Both the majority and the dissent in *Quattlebaum* demonstrated *Nebraska Press*'s unwieldiness as a standard to be applied in all cases of pretrial publicity, regardless of type or extent. The majority found ample reason to depart from *Nebraska Press*. The dissent rightly dismissed the fiction that appellate courts need not prioritize among conflicting rights and found justification to extend *Nebraska Press* to its logical conclusion that prior restraints may never be imposed to protect a criminal defendant's right to a fair trial. This argument is especially troubling because it singularly sacrifices the right to a fair trial to the idol of a free press. Meanwhile, imposing restraints on the press continues to be acceptable when necessary to spare pure property interests (copyrighted material), the sensibilities of protected groups (hate speech), or the Federal Trade Commission's paternal instincts regarding deceptive advertising. Each of these interests is important, but they pale in comparison with the constitutional right to a fair trial.

When communication covered by the attorney-client privilege is publicly disclosed, far more than just an impartial jury is threatened. The Sixth Amendment right to effective assistance of counsel and the Fifth Amendment right against self-incrimination are both destroyed. The First Amendment, though ostensibly inviolate, may be abridged or completely sacrificed to give way to overwhelming competing public interests. In contrast, the right to a fair trial has been consistently held to be absolute and preeminent over all other considerations. The *Nebraska Press* test remains appropriate when courts face generalized, pervasive publicity, but is not helpful in dealing with specifically limited, but potentially devastating, threatened disclosures.

Freedom of the press is a foundation of democracy. The right to a fair trial is the keystone of justice. When these two impermeable principles clash, defenders of freedom fear the very institution of liberty. The procedures and standards suggested in Part VII afford a mechanism for courts to remain true to the imperatives of both the First Amendment and the Sixth Amendment without either constitutional imperative unnecessarily trampling on the protections and rewards of the other.

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